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LIST OF CASES CITED

IN THE

SUPREME COURT OF THE UNITED STATES

DETROIT UNITED RAILWAY,
Plaintiff and Appellant,
vs.
CITY OF DETROIT, et al.,
Defendants and Appellees.

BRIEF FOR APPELLANT.

Statement of the Case.

Appellant commenced this suit in the District Court of the United States for the Eastern District of Michigan for the purpose of preventing the City of Detroit and the other defendants, who are officials of the city, from taking any steps to acquire a municipal street railway system by the issue of city bonds under the proposition for acquisition of such a system, which received the affirmative vote of the electors of the city at an election held April 5, 1920. The grounds of relief are that this proposition was not so framed and submitted that its adoption by the electors empowered the city to acquire the system. And that the scheme of which this proposition is a part, is an attempt to deprive plaintiff of its property without due process of law.

The jurisdiction of the Federal Court is invoked upon the ground that the execution of the scheme of which this acquisition proposition was a part would deprive the

plaintiff of its property without due process of law, in contravention of the 14th Amendment to the Constitution of the United States.

The defendants appeared and moved to dismiss the bill of complaint upon the ground that the Federal Court did not have jurisdiction, and that the bill made no case for equitable relief.

This motion was duly heard and the Court entered a decree drafted by defendant's counsel holding that it had jurisdiction, and dismissing the bill for lack of equity, but (as pointed out in our brief opposing appellee's motion to dismiss or affirm, p. 3) granting defendant city affirmative relief.

From this decree plaintiff appeals to this court.

The case stated in the bill of complaint is in substance this:

On February 27, 1920, the Common Council of the defendant City adopted an ordinance for the acquisition by the city of a street railway system as therein described, and to submit to the city electors a proposition authorizing such acquisition, and the issue of Fifteen Million Dollars of city bonds to provide therefor. (See Section 3 of the bill, and Exhibit 3 attached thereto, R. pp. 3, 27.)

The ordinance is in five sections, Section 1 reading as follows:

> "That the Common Council of the City of Detroit hereby declare * * * it necessary that the Board of Street Railway Commissioners proceed, and the said Board of Street Railway Commissioners is hereby authorized and directed to proceed as soon as practicable to acquire, own, maintain, and operate, for and in behalf of the said City of Detroit, a street railway system upon the

surface of the streets, avenues, and public places * * * as herein designated, to-wit:" (then follows a detailed description of the proposed lines in three classes, A, B and C, and aggregating some 211 miles of trackage) "together with all necessary and convenient turn-outs, turn-tables, curves, sidetracks, switches, connections, poles wires, and overhead power equipment in and along the streets avenues and public places herein designated so as to make a complete street railway system; and to make the necessary purchases of land, machinery, engines, ties, rails, poles, wires, conduits, cars, tools and all other articles, apparatus, appliances, instruments and things necessary to construct, own, maintain and operate, *and said Board of Street Railway Commissioners shall construct, own, maintain and operate in said City of Detroit for said City of Detroit * * * a system of street railways upon the surface of the streets, avenues and public places herein designated, and further* said Board of Street Railway Commissioners are hereby authorized for and in behalf of the City of Detroit to purchase or construct such carhouses, powerhouses, shops, stations, and other buildings as may be required to maintain and operate said street railway system."

Section 2 provides:

"This body, being the legislative body of the City of Detroit, hereby propose that the following proposition be submitted to the qualified electors of the City of Detroit * * * which proposition shall be printed on the ballots in words and figures as follows:

'Shall the City of Detroit be authorized and empowered to acquire, own, maintain and oper-

ate a street railway system upon the surface of the street, avenues and public places of the City of Detroit * * * as hereinafter designated, to-wit:' (Then follows the same description of lines classified as A, B and C lines as is contained in Section 1 of the Ordinance.) 'Together with all necessary and convenient turnouts, turntables, curves, side tracks, switches, connections, poles, wires and overhead power equipment in and along the streets, avenues and public places herein designated so as to make a complete street railway system, and to make the necessary purchases of lands, machinery, engines, ties, rails, poles, wires, conduits, cars, tools and all other articles, apparatus, appliances, instruments and things necessary to construct, own, maintain and operate a street railway system upon the surface of the streets, avenues and public places herein designated and to purchase or construct such car houses, power houses, shops, stations and such other buildings as may be required to maintain and operate said street railway system and to borrow money on the credit of the City of Detroit by the issuance of the public utility bonds of the City of Detroit up to an amount not to exceed Fifteen Million ($15,000,000.00) Dollars for the purpose of so acquiring and owning said street railway system?

Yes ☐

No ☐'"

Section 3 of the ordinance provides for calling a special election for the vote on this proposition.

Sections 4 and 5 provide that if any clause in the ordinance is held invalid, it shall not affect the validity of the remainder, and that the ordinance shall take effect 30 days after approval by the Mayor.

Plaintiff is a taxpayer in the City of Detroit, paying taxes on property having an assessed value of upwards of twenty-five millions of dollars, and taxable on account of the city bonds proposed to be issued under the proposition set forth in the ordinance, to an amount in excess of three thousand dollars. It owns and operates the street railway system in the City comprising approximately 290 miles of track, and also interurban lines connecting therewith of approximately 565 miles. (Bill, Sections 2 and 5, R. pp. 3, 8).

The plaintiff's city system includes certain lines known as the Fort Street Lines with a single track mileage of approximately 30 miles, the Woodward Avenue line, with a mileage of approximately 19 miles, and certain lines constructed under what are commonly known as the "day to day agreements" between the plaintiff and the city, with a mileage of about 50 miles (R. pp. 2, 4).

Of these lines, the part of the Fort Street lines east of Artillery Avenue, with a mileage of 16 miles with a present value of approximately $1,400,000, part of the Woodward Avenue line south of Milwaukee Avenue, with a mileage of nearly 7 miles, and a present value of $614,000, and of the lines constructed under day to day agreements, nearly 30 miles, with a present value of approximately $3,750,000, are upon streets comprised in the city system as described in the ordinance and proposition above stated. (Ordinance and proposition, Class "A" lines, paragraphs 11-12, 13-21; R. pp. 29-31.)

About 330,000,000 of revenue passengers are carried annually on plaintiff's city system, and of these approxi-

mately 23,000,000 passengers are carried over the Fort Street lines east of Artillery Avenue, and approximately 55,000,000 are carried over the part of the Woodward Avenue line south of Milwaukee Avenue (bill of complaint, R. p. 9).

Those portions of these lines above described which are situated on streets comprised in the proposed city system are, owing to the relative locations of the industrial, commercial and residential districts of the city, essential parts of those lines, and of the plaintiff's city system, and are essential to the proper service by that system of the transportation needs of the public (bill, R. p. 4). These portions of the lines on the streets comprised in the proposed city system, and particularly the Fort Street lines east of Artillery Avenue, the Woodward Avenue line south of Milwaukee (ordinance and proposition Class A lines, paragraphs 11 and 12, R. pp. 29, 30) which would constitute the only means of access afforded by the proposed city system to the main business center of the city (bill of complaint, Section 7, R. p. 9) are likewise essential to that system, and without these lines the remaining lines proposed to be acquired by the city would be of little use.

The acquisition by the city of the lines which it proposes upon the streets described in paragraphs 11 and 12 of its proposition must be either by purchasing the present tracks of plaintiff upon these streets, or by removing them and replacing them with new tracks, what they really propose being a threatened exercise of the power of ordering removal to compel appellant to sell this trackage at an inadequate price. (Bill of Complaint, Secs. 11-13, pp. 10, 11, 14-17.)

Plaintiff's franchises for a portion of its Fort Street lines east of Artillery Avenue were, in February, 1913,

in the so-called Fort Street case, held by the Supreme Court of Michigan to have expired, and their decree provided that the company should, when directed by resolution of the Common Council of Detroit, cease operation of these lines, and remove the tracks from the streets. This decision was affirmed by the Supreme Court of the United States in *Detroit vs. Detroit United Railway*, 229 U. S. 39. The City, however, has never attempted to obtain enforcement of this Fort Street decree; and although it claims that the franchise to the part of the Woodward Avenue line south of Milwaukee Avenue expired in 1909, has permitted the operation of both these lines to continue, and has recognized that their continued operation is necessary in the public interest (bill, Sec. 4, R. p. 5).

Among these acts of recognition are:

(a) The so-called Kronk ordinance (considered by this Court in *Detroit United Railway vs. Detroit*, 248 U. S. 429) which this Court said, in that case, provided "for the continued operation of the company's system with fares and transfers for continuous trips over lines composing the system, whether the same had a franchise or not"; and "amounted to a grant to the company for further operation of the system during the life of the ordinance." (Exhibit 4-b, R. p. 47).

Also:

(b) A suit commenced by the City against the Company in the state court in June, 1919, to compel the operation of certain lines of the system, as essential in the public interest, the operation of the system having been suspended by a strike. In this case it was decreed that the company should operate not merely the lines

specified in the City's bill of complaint but its entire system, for a number of months therein specified, and at a rate of fare fixed in the decree, with a provision for the determination of the rate of fare thereafter by arbitration. The city council passed a resolution approving the arrangement embodied in this decree. (Exhibit 4-c, 4-d, 4-e, R. pp. 48-50).

Plaintiff has expended since expiration of the franchises for its Fort Street Lines, east of Artillery Avenue covered by the decree in the Fort Street case, in the reconstruction of the Fort Street lines, and additions and betterments thereto, in order to give proper service, nearly a million and a half dollars, nearly nine hundred thousand dollars of which was expended on the part of those lines east of Artillery Avenue.

The most of these expenditures were made after the entry of the Fort Street decree. The Company also spent in the reconstruction of and additions and betterments to, that part of the Woodward Avenue line, south of Milwaukee Avenue, in order to give proper service thereon, from the year 1909 (when the city claims the franchise therefor expired) down to 1919 about $230,000.00. These expenditures both upon the Fort and Woodward lines were made with the knowledge and acquiesence, and either tacit or express approval of the City of Detroit and its officials. The City Charter requires the issue of a permit for doing in the streets of the city such work as that involved in these expenditures, and all of the work was done under written permit and under the supervision of city inspectors, for whose services the city rendered bills to the company which the company paid. In a number of cases the work was done under direction given by a resolution of the com-

mon council of the city. During the period between the expiration of the franchises and 1919 numerous other resolutions were passed by the council directing changes in service and improvements in service over the parts of the Fort Street and Woodward Avenue lines covered by these franchises which involved considerable expense to the plaintiff company and with which it complied. (Bill, Sec. 5, R. pp. 6-8.)

Included in the plaintiff's city system there are approximately 92 miles of track (including said portions of the Fort Street and Woodward Avenue lines), franchises for which the City claims have expired. Upon them the company has spent in all, and including the expenditures above detailed, approximately $2,800,000.00 since 1909, in order to continue their operation, and that the system might give efficient service, and with the knowledge and acquiescence and approval of the City and its officials under the permits obtained from the city, and in compliance with resolutions of the city council. (Bill of complaint, Section 5, R. p. 8.)

By reason of these acts of recognition of the necessity of these lines whose original franchises have expired, and of their continued operation, and by reason of the expenditures thereon under the direction and by the authority of the city officials, and with the acquiescence and consent of the city and the people of the city, it is claimed that the right of the city to compel the removal of the Fort Street lines east of Artillery Avenue and the right to enforce the removal of that part of the Woodward Avenue line south of Milwaukee Avenue, has ceased, and that the plaintiff has the right and is charged with the duty to continue the maintenance and operation of those lines until such time as the discontinuance of that

maintenance and operation may be consistent with public interest.

Included in the proposed city system (Bill of Complaint, Section 9, Rec. p. 10) are certain lines running in part through the City of Highland Park and the Village of Hamtramck, which city and village are included within the external boundaries of the City of Detroit. These lines are important links in the proposed municipal system and essential to its operation and efficiency. On the streets which these proposed lines cover there is no street railway franchise and under the charter of the City of Highland Park and under the general laws of the State of Michigan there is no power to grant such franchises to the City of Detroit and therefore there is no authority under which the right to construct and operate these lines either in Highland Park or in Hamtramck can be obtained.

In the first section of the ordinance for the acquisition of the municipal street railway system, adopted February 27, 1920, there is an express direction that acquisition shall be by construction,—"said Board of Street Railway Commissioners *shall construct*, own, maintain and operate," etc. (Exhibit 3, R. p. 23.) The proposition for submission to the voters, however, set forth in the second section of the ordinance, omits this explicit direction, its language being, "Shall the city of Detroit be authorized and empowered *to acquire, own*, maintain and operate a street railway system • • • and to make the necessary purchases of land • • • and things necessary to construct, own, maintain and operate a street railway system • • • and to purchase or contruct such car houses • • • and such other buildings as may be required to maintain and operate

said street railway system, and to borrow money on the credit of the city * * * to an amount not to exceed Fifteen Million ($15,000,000) Dollars, for the purpose of so *acquiring* and owning said street railway system." (Exhibit 2, Record p. 34, 40.)

At this time those who desired municipal ownership of street railways were divided in opinion, many of them desiring acquisition by the city of existing lines where such lines exist, and construction only where there are no existing lines, and many others desiring the construction by the city of a complete system, without acquisition of any existing lines. The proposition voted upon at the April election was framed with a view to this division of public sentiment, and for the purpose of combining, to carry the proposition, the votes, both of those who favored purchase, and of those who favored construction, as methods of municipal acquisition. The corporation counsel who participated in framing the ordinance, in a public statement upon March 27 said that if the construction and purchase features of the plan were separated, the proposition would never pass, as voters favoring construction might object to a purchase plan and those favoring purchase might object to a construction plan. (Bill of Complaint, Section 12, R. pp. 11 and 12). The total vote upon the proposition was 140,378; for the proposition, 89,285; against it, 51,093; the number of votes in excess of the 60 per cent. needed to carry it being 5,059 (Bill of Complaint, R. p. 4).

The city officials authorized to frame this proposition and charged with the duty of submitting it to the voters made certain representations to induce the voters to believe that under the proposition submitted, where the proposed city system comprised lines on streets now occupied by the plaintiff's tracks (Fort Street east of

Artillery, Woodward Avenue south of Milwaukee, and day to day tracks) such trackage would be acquired by purchase under its real value, and that the only lines acquired by construction would be upon streets where there are now no tracks. The representations were as follows:

The Mayor of the city in his message submitting the ordinance of February 27th, 1920, to the Common Council, and recommending its adoption. (Bill R. pp. 12, Exhibit 5, R. p. 51) said:

> "The Class A system (that is, the lines under Class A in the ordinance and proposition) provides the taking over of 34.25 miles of lines built under the so-called 'day-to-day' agreement, in which the city has the right to purchase the lines at cost to the railway company, less depreciation, and which is estimated will be about $40,000 per mile. Added to this, we propose to take over the so-called Fort Street line and the Woodward Avenue line to Milwaukee Avenue, which aggregates an additional 21.25 miles, which, it is safe to assume, the railway will be glad to deliver us in preference to getting off the street, at, say, an estimated cost of $40,000 per mile."

He states further items of cost of construction of the additional new lines proposed in Classes A and B system and cost of equipment, the aggregate total cost of purchase, construction and equipment being $15,022,500, and says that:

> "As the building of Class C system will necessarily be delayed for some time, we have not included the cost of these lines in our figures, but have included only the cost of constructing and equipping the lines proposed in Classes A and B."

He also says:

> "In proposing this $15,000,000 public utility bond issue, we have been very liberal in our estimates of the probable cost of the completed street railway system which the plans cover."

Furthermore, the Mayor and Common Council caused to be prepared and distributed to the voters some weeks before the election of April 5, 1920, at which this proposition was submitted, a document purporting to be a statement of the street railway plan (designated on its face as "official information") to be voted on at the election, which contained the proposition to be voted on in the form prescribed in the ordinance (in effect a sample ballot) and which contained also other parts of the ordinance, but omitted the part of Section 1 which explicitly directs the Board of Street Railway Commissioners to *construct* the lines proposed. (Bill of Complaint, R. pp. 12-13. R. p. 53.)

This document contains a statement of the financial plan for the acquisition of the lines, including the following:

> "Financial plan for A and B lines.
> "Present trackage to be taken over at cost less depreciation as specified at the time the company was given permission by the city to build under a day to day agreement, 34.25 miles estimated at $40,000 ..... $1,370,000.00
> "Fort and Woodward tracks where franchises expired, 21.25 miles estimated at $40,000 .$850,000.00."

The document contained a map showing in red the street railway lines comprised in the proposition, each line being numbered, and there was appended to the financial statement a key to these lines which key included the following:

> "D. U. R. lines taken over, Nos. 11 to 21 inclusive."

The statement concluded as follows:

> "This official information on the new street car plan is issued by the B. of St. R. C. (meaning the Board of Street Railway Commissioners) with approval of common council."

This document or so-called sample ballot with this official information endorsed thereon was received by

over 75 per cent of the voters. Over 10 per cent of them did not receive it.

After the Court had rendered an oral opinion that the making of these representations were unofficial acts, and had no bearing upon the questions involved in the case (R. p. 59), plaintiff made a motion (R. p. 61) to amend its bill so as to show that the document, Exhibit 6, containing the so-called "official information," was in fact prepared and distributed through the official action of the city officials. The motion was denied by the Court (R. p. 65) on the refusal of the plaintiff to make certain further amendments to its bill relating to an entirely different subject, proposed by the defendants.

The bill charges that these representations (which were contrary to the true meaning and effect of the ordinance) were adapted to and intended to and, in fact, did induce the voters of the city to believe that under the proposition submitted the city would be empowered to purchase the company's Fort Street lines east of Artillery Avenue, and Woodward Avenue line south of Milwaukee Avenue, and would be able to force the company to sell these lines to the city at much less than their value by threatening that if the sale were not made the company would be compelled to remove these lines and thereby suffer the loss of their value and a great impairment of the value of its other lines and property.

The bill charges also that the city designs to give no opportunity to test the validity of its plan by legal proceedings before its execution, but proposes under the claim that the franchises of the Fort Street lines east of Artillery Avenue and Woodward Avenue line south of Milwaukee Avenue have expired and by threatening

to require the removal of these tracks, to force the company to sell them to the city at much less than their value. That this ordinance and proposition were framed in furtherance of that design, and that if the company will not sell its property to the city for the inadequate price offered, the city and its associated defendants will order the removal of these tracks and their equipment from the streets and proceed in the enforcement of that order so far as may be necessary to force a sale by the illegal use of the police and other authority vested in officials who were appointed by the Mayor and are removable at his will and subservient to his dictation. (See Bill of Complaint, R. pp. 14-17, 19-21.)

The substance of the case thus stated and its legal effect may be condensed in the following propositions:

1. The proposition adopted by the voters is for the acquisition of a municipal street railway system upon streets among which are certain streets occupied by tracks belonging to the plaintiff's street railway system, and which are essential thereto.

2. The acquisition of tracks upon the streets so occupied is also essential to the proposed municipal system, because without them that system cannot give the service which the public needs require, and which it is designed to supply.

3. Tracks upon those streets can only be acquired by the city in one of two ways: By purchasing the existing tracks of the plaintiff or by removing and replacing them with new tracks.

4. Though the original franchises for the tracks existing upon the most important of these streets have expired, the plaintiff has, through acts of the city recognizing the necessity for the continuance of their operation,

and through expenditures and improvements since the expiration of these original franchises made by the direction and under the authority of the proper city officials, and with the acquiescence and consent of the city authorities and the people of the city, acquired the right to continue the maintenance and operation of those tracks until such time as it shall be consistent with the public interest to discontinue it.

5. The proposition to acquire the street railway system was not so submitted to the voters that their affirmative vote thereon authorized such acquisition.

(a) Because the proposition was to acquire a street railway system by construction, not only on streets where there were not existing lines, but also on streets where lines did exist and it was not so submitted to the voters.

(b) Because the proposition was so submitted as to get the affirmative vote of a large number of electors who voted therefor, believing that the scheme of street railway acquisition was to purchase the existing trackage of appellant on the streets mentioned in the proposition, and it is to be presumed that otherwise it would not have received the vote of the requisite number of the electors (60% of the total number of those voting).

(c) Because the proposition was so submitted as to get the affirmative vote both of those favoring and of those opposed to purchasing the existing trackage of appellant on the streets mentioned therein, and it is to be presumed that otherwise it would not have received the vote of the requisite number of the electors (60% of the total number of those voting).

(d) Because the proposition submitted to the voters was substantially defective and deceptive in that it authorized fifteen million dollars of bonds only to acquire a complete system, when it was known to the city officials who framed and submitted the proposition at the time of the submission that this amount was grossly inadequate for the purpose, and also in that said system included lines to be constructed in Highland Park and Hamtramck, which are separate municipal corporations and in which no authority for such construction can be lawfully obtained by the City of Detroit.

6. The scheme of acquisition of which the proposition voted on is a part involves in effect an attempt to deprive plaintiff of its property without due process of law, in violation of the 14th Amendment of the Federal Constitution.

(a) Because defendants contemplate and design so to proceed in carrying out that proposition that no opportunity will be given before its execution to test its validity by legal proceedings.

(b) Because defendants contemplate and design the enforced acquisition by the city of the company's property at an inadequate price, by a threat of an illegal removal and destruction of that property, and by proceeding with such removal so far as may be necessary to accomplish that end.

(c) Because defendants contemplate and design putting an end to plaintiff's right of operating cars on its non-franchise lines while public interest requires such operation to continue.

(d) Because plaintiff has a right to continue to operate its non-franchise lines until the city is itself legally em-

powered to furnish transportation, and defendants design to stop said operation before the city is so empowered.

The subject matter of this suit is therefore within the jurisdiction of the Federal courts.

7. The court having jurisdiction because a Federal question is presented, the plaintiff is entitled to relief because of the illegality in the submission of the proposition to the voters, as well as because of the violation of rights under the 14th Amendment.

As the bill sets up a claim of threatened illegal action under color of state authority, to deprive the street railroad company of its property rights, a Federal question is presented, and this court thereby acquires jurisdiction to determine the validity of the municipal street railway proposition, and of the bonds, which, if issued, will be a charge upon the plaintiff as a city taxpayer in excess of $3,000.00; as well as to determine whether the action proposed to be taken by the city to carry that proposition into effect is, in fact, an attempt to deprive plaintiff of its property without due process of law in violation of the 14th Amendment.

The two questions to be considered then are:

I. Whether a Federal question is presented.

If such a question is presented.

II. Whether a case for equitable relief is stated; that is, whether there are any substantial grounds alleged either for the attack made upon the validity of the proposition for acquiring a municipal street railway system, or for the claim that the plan for acquiring such system involves a violation of plaintiff's property rights.

The errors relied upon which involve the questions above stated, and which will not be discussed separately, are as follows:

The Court erred:

1. In granting defendants' motion to dismiss and entering a decree dismissing the bill as presenting no cause for equitable relief.

Assignment of Error 1; R. p. 69.

2. In holding that the acts of the city officials in misrepresenting to the voters the proposition for acquirement of a municipal street railway system did not affect the validity of the adoption of the proposition by the voters.

Assignments 4, 10 and 11. R. pp. 70-71.

3. In refusing to allow an amendment of the bill of complainant, without condition, so as to show the official proceedings of the city officials relative to the preparation and distribution of the document, Exhibit 6, purporting to be a statement of the street railway plan to be voted on, with official information of its meaning and effect.

Assignment 13, R. p. 71; proposed amendment R. p. 61.

4. In holding that said proposition was not invalidated by the fact that, the amount of bonds provided for in the proposition being less than the amount necessary to acquire the street railway lines therein provided for, the statement thereof in said proposition would lead the voters to suppose that the amount of bonds was adequate for the acquisition of the lines.

Assignment 12, R. p. 71.

5. In holding that said proposition was validly submitted and that its adoption gave valid authority to construct, maintain and operate the street railway lines therein described.

Assignment 9, R. p. 71.

6. In holding that the plaintiff had acquired no rights in the streets covered by the Fort Street lines and by the Woodward Avenue lines south of Milwaukee Avenue since the expiration of the original franchises thereon; that plaintiff has no contract rights, privileges or franchises in said streets, and that the city may compel it to cease operation upon and remove its property from said streets, other than said part of Woodward Avenue, under the provisions of the decree in the case of Detroit vs. Detroit United Railway, reported in 172 Michigan Reports at p. 136.

Assignments 2 and 3, R. p. 69.

7. In holding that the facts alleged in the bill of complaint do not present a case of deprivation of property without due process of law, or a violation of the contract rights of the plaintiff, within the meaning of the 14th amendment to the Constitution of the United States.

Assignments 7 and 8, R. p. 70-71.

I

As to the jurisdictional question, the legal proposition on which its decision depends may be stated thus:

When a bill of complaint shows that either pursuant to an invalid statute, or ordinance, or under color, but in excess of, the powers conferred either by statute, ordinance or other state authority, action is taken or threatened to deprive the complainant of contract or property rights in contravention of the federal constitution, a federal question is presented unless it plainly appears that such averment is not real and substantial, but is without color of merit. Such a question being presented, the United States court has jurisdiction to determine the entire controversy, including all questions, whether federal or not, and irrespective of how the federal question is decided, or whether it is decided at all.

The following cases fully support this proposition:

Siler vs. Railroad Company, 213 U. S., 175. This bill attacked the validity of a Kentucky statute creating a state railroad commission, as a violation of various provisions of the federal constitution, and also averred that an order of the commission making a general schedule of maximum rates for certain railroads was invalid because unauthorized by the statute. The Court say (page 191:)

> "The federal questions as to the invalidity of the state statute because, as alleged, it was in violation of the federal constitution, gave the Circuit Court jurisdiction, and having properly

obtained it that court had the right to decide all the questions in the case, even though it decided the federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only.

"This court has the same right and can, if it deem it proper, decide the local questions only and omit to decide the federal questions, or decide them adversely to the party claiming their benefit * * * of course the federal question must not be merely colorable, or fraudulently set up for the mere purpose of endeavoring to give the court jurisdiction."

And (pp. 192-3):

"* * * The Bill sets up several Federal questions. Some of them are directed to the invalidity of the statute itself on the ground that it violates various named provisions of the Federal Constitution * * * while some of the other Federal questions are founded upon the terms of the order made by the commission under what is claimed by the commission to be the authority of the statute. The bill also sets up several local questions arising from the terms of the order and which the company claims are unauthorized by the statute. The various questions are entirely separate from each other. Under these circumstances there can be no doubt that the Circuit Court obtained jurisdiction over the case by virtue of the Federal questions set up in the bill. * * *

Where a case in this court can be decided without a reference to questions arising under the Federal

> Constitution, that course is usually pursued and is not departed from without important reasons. In this case we think it much better to decide it with regard to the question of a local nature involving the construction of the state statute and the authority therein given to the commission to make the order in question, rather than to unnecessarily decide the various constitutional questions appearing in the record."

And the Court contented itself with deciding, and it did decide, that the order in question was not authorized by the state statute.

Home Telephone Co. vs. Los Angeles, 227 U. S., 278.

This bill assailed a city ordinance on the ground that it fixed rates so unreasonably low as to be confiscatory. The federal jurisdiction was challenged on the ground that if this averment were true, the ordinance was repugnant to the state constitution, and that the federal court had not jurisdiction unless the act complained of was in pursuance of authority actually conferred by the state. This contention was overruled. The court say (page 287:)

> "The settled construction of the amendment is that it presupposes the possibility of an abuse by a state officer or representative of the powers possessed, and deals with such contingency. It provides, therefore, for a case where one who is in possession of state power uses that power to the doing of the wrongs which the amendment forbids, even, although the consummation of the wrong may not be within the powers possessed, if the commission of the wrong itself is rendered possible

> or is efficiently aided by the state authority lodged in the wrongdoer. That is to say, the theory of the amendment is that where an officer or other representative of a state, in the exercise of the authority with which he is clothed, misuses the power possessed to do a wrong forbidden by the amendment, inquiry concerning whether the state has authorized the wrong is irrelevant, and the federal judicial power is competent to afford redress for the wrong by dealing with the officer and the result of his exertion of power."

The same case holds (see page 294 and 5) that acts done under the authority of a municipal ordinance, passed in virtue of power conferred by a state, are embraced by the 14th Amendment.

Cuyahoga Power Company vs. *Akron*, 240 U. S., 462. This was a bill by a water company, which claimed to have acquired certain property rights in a river, to prevent the appropriation by the city of waters of that river. It averred that the city had no constitutional power to take the plaintiff's property for a water supply, and averred that the city did not intend to institute proceedings against the plaintiff, but intended to take its property and rights without compensation, and that the purpose of the city ordinance and certain statutes referred to is to appropriate the plaintiff's rights without compensation; that the city purports to be acting under the ordinance and in violation of the contract clause and the 14th Amendment of the Constitution of the United States. A decree of the court dismissing the bill was reversed, the court saying that whether the plaintiff had any rights that the city was bound to respect can be decided only by taking jurisdiction of the case, and

the same is true of the other questions raised, and that, therefore, the district court must deal with the merits of the case.

Green vs. Railroad Company, 244 U. S., 499. This case arose on a complaint of certain railroad companies of a discriminatory assessment of their property made by the State Board of Assessors, the claim being that such assessment was an abuse of the authority conferred upon the assessors, and deprived complainants of the equal protection of the laws. This was held to raise a federal question, and the decision reaffirmed the earlier cases holding that the jurisdiction extended to the determination of all questions, including those of state law, irrespective of the disposition made of the federal question. (See p. 508.)

Cincinnati vs. Traction Company, 245 U. S., 446. This case involved the validity of a city ordinance which was alleged to be a repudiation of certain franchise contracts. The ordinance lowered the rates, (the city's claim being that the franchises for certain tracks had expired and on others had never existed) and provided that, should the company refuse or fail to comply with the terms of the ordinance, the city solicitor should take such legal proceedings as may be necessary to enforce the ordinance or to compel removal of the tracks from the streets. The bill averred (p. 452) that the city under the pretended authority of the ordinance threatens to "and will, unless restrained by order of this court; interfere with and prevent the maintenance and operation by plaintiffs of said electric street railway over the routes described in the grants aforesaid and under authority and in accordance with the terms and conditions thereof * * * which will cause great and irreparable injury to these

plaintiffs," and prayed that the ordinance be decreed void and the city enjoined from interfering with the maintenance of the street railway and from attempting to enforce the ordinance. It was the company's claim (see p. 453) that the city "undertakes by the ordinance complained of to require plaintiff, in disregard of its rights under existing contracts, some of which the ordinance assumes may be good, either to abandon its line over the route in question, or to operate on a day to day license and at a reduced fare." The answer of the city (p. 452-3) denied the jurisdiction of the court, denied that under the authority of the ordinance or otherwise it was proposed to interfere with the operation of the street railroad, and stated that the enforcement of the ordinance "is only authorized and will only be sought by and through an order of a court of competent jurisdiction." After a hearing on the merits, plaintiff was given the relief asked. In the brief for the city on appeal and during the argument in its behalf, it was stated that it was contemplated that the rights of the city should be established only through legal proceedings, and that the ordinance could have no effect prior to judicial determination of the parties' rights, and that until this was had no steps could or would be taken to enforce the ordinance. (See page 454.) The Supreme Court held that "the jurisdiction of the court below was properly invoked, and that it had power to adjudicate the issues presented," and affirmed the decree, limiting, however, the injunction so as to restrain the city from taking any steps to enforce the ordinance (except the institution of necessary court proceedings) prior to final adjudication of the controversies involved and making certain other modifications in the decree. (See pages 454 and 5.)

Columbus Railway vs. Columbus, 249 U. S., 399. This was a bill filed by a street railroad company to enjoin the enforcement of certain franchise ordinances claiming that these ordinances were not contractual but legislative in their nature; that the company had surrendered them because under existing circumstances the rates of fare therein provided were inadequate and confiscatory, and claiming further that if the ordinances were contractual the company was released therefrom because the war conditions had made the continued performance of the contract impossible, those conditions being such as were not in contemplation of the parties when the contract was made.

On a motion to dismiss the District Court had held that there was no jurisdiction because no federal question was involved, but also considered the case upon the merits, and held that no valid cause of action was stated.

The bill averred (page 405) that the defendants unless enjoined will attempt to force the railway company to continue operation under its franchise, in violation of the 14th Amendment. It appears by the decision in the court below (253 Federal Reporter, 499, see p. 501) that while the bill stated that the defendants threatened to enforce continued operation, it did not state the nature of the threats made and the means to which it is expected the city will resort to enforce its threats. It is also stated in the decision of the District Court (see page 509) that no charge was made that other than legal methods will be adopted by the city to compel the complainant to comply with its contract, and "in the absence of a statement clearly showing a threatened resort to illegal means, a court must assume that the city officials will proceed in conformity to law."

The Supreme Court nevertheless held (page 406) that there was jurisdiction in the district court to entertain the bill, "as it presented questions arising under the 14th Amendment to the federal constitution not so wholly lacking in merit as to afford no basis of jurisdiction. Jurisdiction does not depend upon the decision of the case, and should be entertained if the bill presents questions of a character giving the party the right to invoke the judgment of a federal court. We think the elaborate and careful opinion of the District Judge of itself shows that substantial questions arising under the federal constitution were presented by the bill, and that the court had jurisdiction." On the merits, however, the court held that the ordinances in question were binding contracts, and that the company was not relieved from their performance, although war conditions had made continued performance ruinous to the company.

Now, in the case at bar the bill avers that notwithstanding the expiration of the original franchises for part of the Fort Street and Woodward lines, the company has acquired the right to continue the maintenance and operation thereof until such time as the discontinuance of such maintenance and operation shall be consistent with the public interest. It also avers that the proposed municipal system cannot be established without either purchasing these lines or removing them and constructing new city lines in their place, and that it is the intent of the municipal authorities, defendants in this suit, to compel plaintiff to sell these lines to the city at an inadequate price, by the threat to exercise the power of removal.

This right to continue is based upon two grounds:

(a) The action of the city authorities in granting and recognizing the company's right to continued opera-

tion of these lines both by the Kronk Ordinance, (Exhibit 4b, R. p. 47) of which it was said by this court in *Detroit United Railways vs. Detroit,* 248 U. S., 429. (See page 436) that it "amounted to a grant to the company for further operation of the system during the life of the ordinance," and by the arrangement made with the approval of the Common Council in June, 1919, embodied in a decree of the Wayne Circuit Court, for continued operation of the company's entire city system at a uniform fare and for a certain time, and thereafter at a fare to be determined by arbitration. (Exhibits 4-c-d and e, R. p. 48-50.)

(b) The company's expenditure in reconstruction and improvement of these lines after the expiration of the original franchises, under the order and with the permission of the City authorities, and with the consent and acquiescence of the people of the city and their official representatives, and the continued operation of those lines for some seven years since the decree in the Fort Street Case.

Under the Denver case (246 U. S., 178), the rights acquired by the company by reason of these facts are indeterminate franchises in these parts of the Fort and and Woodward lines, terminable only when the public interest warrants such termination and therefore only when the city is legally in a position to provide, otherwise than through the company's operation of these lines, the service that the public needs. But this is not the only condition that must be fulfilled before these franchises can be terminated. The continuance of service on the lines in question required large expenditures upon them, which the company made with the direction and approval of the people and their representatives. It fol-

lows, therefore, that if and when the city, being legally authorized to provide a system of its own, undertakes to do so and to terminate these indeterminate franchises, it must make fair compensation to the company for the property in the lines which these franchises cover and which was created and maintained by these expenditures.

If it undertakes to establish a system without legal authority, taking over or removing our property in so doing, as it necessarily must, or if, although legally authorized to establish its own system, it undertakes to acquire or remove our property in these lines by illegal means or without making fair compensation for it, in either case it is taking property without due process of law.

The bill charges lack of authority to establish a city system on account of the invalidity of the adoption of the proposition to acquire. It also charges that it is proposed to acquire or remove the company's property by illegal means and without making fair compensation. These charges go to the merits and are discussed in that part of the brief dealing with the merits, but both charges are involved in the jurisdictional question also, the charge of invalidity as well as the charge of an attempt to acquire or remove without fair compensation. For if the company has the right to continue until the city obtains legal authority to provide a system of its own and until compensation is provided for the property taken or destroyed in the establishment of that system, a taking of the property without compliance with each of these conditions is a taking without due process of law.

Even if it were true—and we insist that it is not true —that the city authorities of Detroit can at any time put an end to appellant's right to operate its non-franchise lines by a legitimate exercise of their power to compel a cessation of operation and a removal of trackage, it is none the less true that under the averments of the bill, the city intends and threatens to deprive appellant of its constitutional rights.

Because of the circumstances pointed out and discussed on pages 28-30 of this brief, appellant has the right to operate its non-franchise lines and this right will continue at least until the city authorities lawfully exercise the power to compel a cessation of operation and a removal of trackage.

Under the averments of appellant's bill of complaint admitted to be true, the city authorities do not intend to lawfully exercise that power. What they propose to do is this: to order appellant to cease operation and remove its tracks, not for the purpose of having said tracks removed—for that is precisely what they do not want—but solely for the purpose of coercing appellant into making a contract for the sale of said trackage for an inadequate compensation, or, as stated in appellant's bill (R. p. 16):

> "The claimed power of so ordering said tracks and equipment to be removed from said streets is to be exercised only as a pretext and subterfuge for the accomplishing of the said iniquitous scheme of taking said property from the plaintiff for use as a street railway in its precise present condition and in the manner in which it is now used, without paying fair and reasonable compensation therefor."

This we contend is an unlawful threat to exercise the power in question and will result if it succeeds in a confiscation of appellant's property in contravention of the 14th Amendment. In effect it is nothing less than a direct arbitrary attempt to get appellant's property for the public without paying adequate compensation therefor. There is no excuse for this, for the law of Michigan gives to the city the power to acquire this property lawfully, namely, by condemnation, and we respectfully submit that the Court should hold that in the circumstances of this case the city must resort to that power.

Possibly it may be said that inasmuch as the city's order to cease operation and to remove the tracks will not be made with the intention that appellant should comply therewith, no harm will result to appellant. In answer to this we say: It must be supposed that whatever methods can be devised to make this scheme a success will be employed. It is quite easy to conceive of such methods, especially when it is remembered that all the municipal officers whose co-operation is necessary to the accomplishment of that scheme, are appointees of the Mayor (who was the original proposer and principal advocate of this scheme) and removable at his will, and they are subservient to his will and will conform thereto (R. pp. 21-22.) While it is not to be supposed that they will actually tear up and remove a large part of the trackage—for that would defeat the purpose of the scheme—it is to be supposed that they will compel appellant to cease operations and proceed so far in executing the threat of removal as may be necessary to compel appellant to sign a contract to sell its railway on terms satisfactory to the city.

Possibly it may be said that to enjoin the city authorities from thus using their power to order a cessation of operation and a removal of trackage from appellant's non-franchise tracks, is an improper interference with the exercise of that power. The answer to that is that they have no lawful right to exercise that power unless they actually desire to have that operation cease and those tracks removed.

The power to order removal is given to effect a removal—to clear the streets for other traffic or to enable the construction of other lines. This power is limited by the end for which it is given, and can be exercised only to accomplish that end. To use it, not to obtain the removal of the tracks, but to force the company to sell them to the city at less than their value, rather than suffer the greater loss incident to their removal, is a perversion of the power to accomplish the design of acquiring the company's property without making fair compensation. This is an abuse of the power to accomplish an unlawful end.

Nor can it be said that our construction of the power under consideration will result in giving appellant any improper advantage or in depriving the city authorities of any proper advantage, for appellant during the time it operates the lines can always be compelled to charge only reasonable rates, and if the city wishes to acquire them it can always do so by paying no more than they are actually worth.

Moreover, it may be said that both the *Denver case,* 246 U. S., and the *Detroit Railway case,* 248 U. S., which hold that the power to require removal did not give the public authorities the right to obtain the *use* of these railways without fair and reasonable compensa-

tion, are authorities for the proposition that it does not give them the right to take the *corpus* of this property without fair and reasonable compensation.

Perhaps it will be claimed that *Denver vs. New York Trust Company,* 229 U. S. 123, and the *Newburyport case,* 193 U. S. 561, are authorities opposed to the foregoing reasoning. These cases, however, are clearly distinguishable. In each of them the city proposed to construct a municipal plant, as it lawfully might, unless the company owning and operating a public utility would sell its plant to the city for less than its value. In neither case did it appear that the city merely intended by the threat of using its power of construction to coerce the owner of the utility into making a contract to sell the same for much less than it was worth. Indeed, in the latter case the Court after discussing the facts—which are not at all like the facts in this case—said, speaking through the present Chief Justice:

> "And these considerations take this case out of the reach of the authorities which are relied upon as establishing that one cannot enforce a contract benefit derived from, or advantage gained over another by coercing his will by means of threats, even of the doing of a lawful act" (193 U. S. 578).

Nor is it true, as urged by appellees in their brief in support of their motion to dismiss or affirm, that there is no relation between our Federal Constitutional objections and the proposition of street railway acquisition which we assail. The answer to this is found in the averments of the bill of complaint. The bill avers:

> "That it is the claim of the defendants that the effect of the vote of the electors * * * gives them, as city officials, full power and authority to compel said plaintiff to sell to the city its trackage

on Woodward Avenue and on Fort Street and on the day-to-day lines heretofore described, for $40,000.00 per mile, which as heretofore stated, is very much less than its real value and very much less than it would cost the city if it constructed the same; and as to the day-to-day lines, it is very much less than the cost of the said lines to the plaintiff, less depreciation. * * * That it is the intention of said defendants to enforce said claim and they have threatened to do so; and plaintiff upon information and belief says they intend immediately to take steps to enforce it. * * * That it is the intent and purpose of said defendants * * * —which purpose they have threatened to execute—to say to plaintiff, 'You must either sell your trackage at the inadequate price the city offers or cease operating your cars thereon and tear up and remove the same from the streets' * * *. That it is the intention of said defendant Couzens, acting as Mayor of the City of Detroit, and of the other defendants who are subservient to his will, and who will conform to his will, to resort to other illegal means to compel plaintiff to assent to a sale of its said property for said inadequate value * * * and that it is the intention of said defendant Couzens, acting as Mayor of the City of Detroit, and of the other defendants who are subservient to his will, and who will execute his will, to at once put in force said street railway proposition, and upon the assumption, too, that this gives the city officials the authority to compel plaintiff to sell its trackage as aforesaid without giving plaintiff or any other persons the opportunity of having an adjudication as to the legality of the same" (R. pp. 20-21).

It cannot be claimed under these averments admitted to be true, that the disaster which appellant apprehends is not imminent and that it will only come as a result of court proceedings. Upon the contrary, these averments prove that it is imminent and that it will not come as a result of court proceedings.

It is true that because of the provisions of the city charter set forth on page 18 of the Record, the city authorities cannot acquire appellant's railway by a contract of purchase until that contract is approved by a vote of three-fifths of the electors; but these provisions do not prevent the city authorities, the defendants in this suit, from extorting from appellants by the means above described, a contract to sell its railway on the terms above indicated.

If we are right in our contention that the extortion of this contract by these means is an illegal and unconstitutional exercise of the city's power—and we submit we are—the relation between the threatened deprivation of our property rights and the proposition of acquisition is intimate and direct.

If there will ever come a time when we have a right to invoke judicial relief to prevent the threatened invasion of our constitutional rights, that time had come when this bill of complaint was filed.

Federal jurisdiction exists where the existence of a constitutional question is averred, unless, in the language of Chief Justice White in *Newburyport Water Co. vs. Newburyport,* 193 U. S., 561 (see page 576) "it plainly appears that such averment is not real and substantial, but is without color of merit." The averments in the present case, under the authorities above cited, are clearly sufficient to give jurisdiction.

II

The grounds for equitable relief set up in the Bill are these:

1. The proposition to acquire the street railway system was not so submitted to the voters that their affirmative vote thereon authorized such acquisition.

(a) Because the proposition was to acquire a street railway system by construction, not only on streets where there were not existing lines, but also on streets where lines did exist and it was not so submitted to the voters.

(b) Because the proposition was so submitted as to get the affirmative vote of a large number of electors who voted therefor, believing that the scheme of street railway acquisition was to purchase the existing trackage of appellant on the streets mentioned in the proposition, and it is to be presumed that otherwise it would not have received the vote of the requisite number of the electors (60% of the total number of those voting).

(c) Because the proposition was so submitted as to get the affirmative vote both of those favoring and of those opposed to purchasing the existing trackage of appellant on the streets mentioned therein, and it is to be presumed that otherwise it would not have received the vote of the requisite number of the electors (60% of the total number of those voting).

(d) Because the proposition submitted to the voters was substantially defective and deceptive in that it

authorized fifteen million dollars of bonds only to acquire a complete system, when it was known to the city officials who framed and submitted the proposition at the time of the submission, that this amount was grossly inadequate for the purpose, and also in that said system included lines to be constructed in Highland Park and Hamtramck, which are separate municipal corporations and in which no authority for such construction can be lawfully obtained by the City of Detroit.

2. That the scheme of acquisition of which the proposition voted on is a part, involved in effect an attempt to deprive plaintiff of its property without due process of law, in violation of the 14th Amendment of the Federal Constitution.

We will discuss these propositions separately.

The proposition to acquire the street railway system was not so submitted to the voters that their affirmative vote thereon authorized such acquisition.

We stated four reasons 'a', 'b', 'c', and 'd', for this proposition. We will discuss reasons 'a', 'b', and 'c' together.

The ordinance provided for the acquisition of a street railway system on two classes of streets: On those where there were, and those where there were not existing street railways. The ordinance, in explicit terms, provided for the acquisition of the entire system by construction. It contained these words (R. p. 33):

> "and said Board of Street Railway Commissioners shall construct, own, maintain and operate for

> said City of Detroit * * a system of street railways upon the surface of the streets, avenues and public places herein designated."

This ordinance was ineffectual, unless the proposition of acquisition, which it contained, was approved by the electors of the city under the following provision of the State Constitution:

> "nor shall any city or village acquire any public utility * * unless such proposition shall have first received the affirmative vote of three-fifths of the electors of such city or village voting thereon at a regular or special municipal election."
> (Constitution of Michigan, Article VIII, Sec. 25).

The Common Council of the city, who framed the ordinance also had the duty of framing and did frame the proposition to be submitted to the electors, but in doing so they omitted the language of the ordinance above quoted, limiting the methods of acquisition of the entire system to construction, and used the following ambiguous language (R. pp. 34, 40):

> "Shall the City of Detroit be authorized and empowered to acquire, own, maintain and operate a street railway system * * as hereinafter designated (following with the description of the different lines) * * so as to make a complete street railway system and to make the necessary purchases of lands * * * and things necessary to construct, own, maintain and operate a street railway system upon the surface of the streets, avenues and public places herein designated, and to purchase or construct such * * * buildings as may be required to maintain and operate said street railway system."

So that it is not true, as stated in appellees brief in support of its motion to dismiss or affirm, page 23.

> "A reading of the ballot, whose language was prescribed fully in section 2 of the Ordinance (R. p. 34), shows that the proposition was fully described in precise elaboration, and that nobody could misunderstand it."

What is true is this, that by omitting the words requiring construction, the proposition of acquisition submitted to the voters was ambiguous and susceptible of being understood as authorizing acquirement either by purchase or by construction, although the ordinance by the language omitted from the proposition submitted, explicitly requires construction and (because of the requirements of the charter set forth on page 18 of the Record) does not authorize purchase. Taking advantage of this ambiguity and having in mind the fact that a large proportion of voters desired (See Record p. 11) to purchase existing lines and to use the power of construction only where there were no such lines, the city officials charged with the duty of submitting the proposition, issued and distributed among the voters, before the election, in the effective manner herein set forth, sample ballots setting forth the proposed plan. (Record pp. 12 & 13) (See Exhibit 6, sample ballot opposite p. 52). This was designated on its face "official information." It was issued officially by the Common Council under its authority to make the submission and the expense of issuing and distributing the same was paid for by the city. (See appellant's motion to amend, R. pp. 61-64 and the disposition thereof, p. 65).

This "official information" set forth what was called the financial plan for 'A' and 'B' Lines, as follows:

FINANCIAL PLAN FOR 'A' AND 'B' LINES.

Present trackage to be taken over at cost less depreciation as specified at the time company was given permission by city to build under a Day-to-Day agreement:

34.25 miles estimated at $40,000.00	$ 1,370,000.00
Fort and Woodward tracks where franchise has expired 21.25 miles estimated at $40,000.00	850,000.00
New tracks in unserved districts, 100.75 miles estimated at $70,000.00	7,052,500.00
400 new electric motor cars estimated at $10,000 each	4,000,000.00
150 new trailers estimated at $5,000.00 each	750,000.00
(If the Ford gas car is used, the cost of cars will be reduced about fifty per cent)	
Car Barns, tools, etc	1,000,000.00
Total	$15,022,500.00

This $15,000,000.00 bond issue is for 30 years and will be paid by yearly installments through that period.

The Class "C" Lines, consisting of 62 miles, will be developed as soon as 'A' and 'B' are in operation.

The $15,000,000.00 bond issue covers the building, equipping and where it is proposed, the taking over, of a total of 156 miles of the complete system of 218 miles."

The falsity of the representation that these lines would be taken over is obvious, when it is borne in mind that the ordinance in explicit terms required them to be constructed. It is true that these sample ballots with the official information thereon did not reach all the voters; as to this plaintiff's Bill of Complaint avers:

> "Sample ballots, with the official information endorsed thereon, were distributed prior to the last day for the registering of the voters to vote at said election on April 5th, and at addresses taken from the previous registration lists." (This means their residence addresses).
>
> "By reason of the fact that large numbers of electors who had previously registered had changed their residence and the further fact that large numbers of new voters for the first time registered at the date of last registration, to-wit: on March 20th, many thousand electors who voted upon the proposition above referred to on April 5th, to-wit: a number exceeding ten per cent thereof, had not received and did not receive or have the benefit of the sample ballot with the explanatory information endorsed thereon to guide them in reaching their decision as to how they desired to vote, while the greater number, to-wit: a number exceeding seventy-five per cent thereof, had received such sample ballot with such official information endorsed thereon. That by reason of such situation, large numbers, aggregating many thousands, voted upon said proposition on April 5th with different understandings as to the question to be determined at the election of April 5th." (Record pp. 13-14).

In the light of these facts we are to determine whether the proposition to acquire was so submitted to the voters that their affirmative vote therefor authorized the acquisition, and in doing this, we must bear in mind that the ordinance upon which they were to vote made acquisition by construction mandatory, and that this meant that the existing trackage of appellant upon the streets specified in the ordinance should be removed and new trackage constructed by the city.

Whatever may be said concerning the votes of those who did not receive the sample ballot—a subject discussed later in this brief—it is clear that those who did receive them and gave credit to the statements thereon, were deceived.

As the bill avers (R. p. 17):

> "The municipal authorities * * did induce them to credit their official statements, representing that where these street railways existed they would be taken over"

it follows that these electors were thus induced to vote for a proposition to derange the existing transportation system of the city of Detroit in the belief that they were voting not to disturb that system. And it was no small number of them who were thus deceived. As already pointed out, the bill avers that over seventy-five per cent of those voting on the proposition received these sample ballots with the official information thereon and we are abundantly justified in our claim (b) that it is to be presumed that the proposition would not have received the vote of the requisite number of the electors had not this deception been practised. It is likewise true that owing to the fact that over ten per cent of the voters (and this means over 14,000 of them) did not receive the sample ballot, and for other reasons hereinafter

stated, many of those who voted for it did so because they believed that they were voting for a proposition to remove appellant's trackage and to construct new trackage in its stead, and therefore we are justified in our claim:

(c) That the proposition was so submitted as to get the affirmative vote both of those favoring and those opposed to purchasing the existing trackage of appellant.

It is to be observed too that while the sample ballot distinctly assures the voter that existing trackage will be taken over, it is nevertheless true that it was so gotten up as to induce every elector favorable to municipal street railway acquisition, by any method whatsoever (that is, those voters favorable to a purely constructive acquisition as well as those favorable to an acquisition by purchase), to vote for it, for in very large letters on the face of the ballot it is stated: (see Exhibit 6, opposite to page 52).

> "INSTRUCTIONS: IF YOU FAVOR THE ACQUISISITION, OWNERSHIP, MAINTENANCE AND OPERATION OF A MUNICIPALLY OWNED STREET RAILWAY SYSTEM IN THE CITY OF DETROIT, MARK A CROSS (X) IN THE SQUARE AFTER THE WORD YES. IF YOU DO NOT FAVOR SUCH A PROPOSITION, MARK A CROSS (X) IN THE SQUARE AFTER THE WORD NO."

It is also to be noted that by the statement on the sample ballot that the day-to-day "trackage is to be taken over at cost less depreciation," the city did not commit itself to such taking over, because no contract to purchase was submitted, as required by the provisions of the Charter quoted on page 18 of the Record, and that this was omitted:

> "So the city might be free to order these tracks torn out and replaced with city built lines," and to get for the proposition the votes, both of those who favored and of those who opposed acquisition by construction. (See published interview of corporation counsel Wilcox who drafted the ordinance, R. p. 11).

It is difficult to understand why any one should vote for a proposition which committed the city authorities to the project of removing the existing trackage and replacing it by trackage constructed by the city. That, however, is the project of the ordinance. It is a project devoid of sense and honesty: equally opposed to the best interests of the city and of the company, and yet there were in the city of Detroit, a city of a million inhabitants, "a large number of voters" who favored it (Record p. 11) and who doubtless voted for it.

Of course these voters are reckless and thoughtless and constitute a class much smaller than the sane and thoughtful who would vote for a project of street railway acquisition which did not derange the city's existing transportation system. Just how many of these reckless and thoughtless voted for the proposition, believing it to be a proposition of construction, cannot of course be known, but under the circumstances above stated the submission should not be held valid, on the ground that they were so small in number as not to affect the vote; on the contrary, it should be presumed that their number was sufficiently large to justify our claim that otherwise the proposition would not have received the requisite majority of electors. (The excess over the requisite majority was only 5,059). The illegality of such a submission is obvious; for whatever course the public

authorities might thereafter take, whether they proceed to acquire by purchase or by construction, would be diametrically opposed to the intent of one or the other of these classes of electors whose votes were indispensably necessary.

But it is said for a variety of reasons which will be hereafter discussed, that a court is powerless to afford relief upon the ground that the voters were deceived by the official assurances above described. Even if this were true—and we deny that it is true—we nevertheless contend that if these official assurances are disregarded, there was no valid submission of the real proposition of acquisition, because of the omission therefrom of the language of the ordinance saying, "said Board of Street Railway Commissioners shall construct" these street railways. Had these words been in the proposition submitted—and we can conceive no honest reason for omitting them—the voters, had not the proposition been misrepresented, could not have misunderstood it. With these words omitted, it was, as we have already stated, ambiguous and susceptible of being understood as authorizing acquirement either by purchase or by construction.

However, it is not true that the courts are powerless to afford redress for the deception effected by the official misrepresentations above described.

Counsel for the city in their argument on the motion to dismiss in the trial court argued (and their argument was adopted by the District Judge, see his oral opinion, (Record p. 59) that what representations were made during the campaign, whether true or false, were immaterial and could not be enquired into. That the statements made to the electors regarding the meaning and effect of

the proposition, though made by the officials charged with the duty of submission, could not be considered as official acts, and in no respect differed from statements made in newspapers, and on the stump, by persons having no official character; that these misrepresentations were representations as to the construction and legal effect of the proposition submitted; that the ordinance itself (which contained the language requiring the system to be acquired by construction only) was correctly published, and that the voters must be presumed to know the law, and, therefore, to have known that the statements made to them were false, that the voters were acting in a quasi legislative capacity, and that therefore their motives and the reasons that influenced them could not be enquired into.

In answer to this argument we quote from the Brief of former Justice Hughes filed as counsel for appellant in opposition to appellee's motion to dismiss or affirm:

> "Fortunately there is no such absurd and artificial rule of law. The City authorities were not acting outside their power in formulating the submission. To have a valid submission it was necessary that they should act validly within their power. The position taken by the District Court that the motives of electors and legislators cannot be inquired into is beside the point and its statement that the acts complained of were 'unofficial acts' is, we submit, erroneous and shows an entire misconception of the case.
>
> "This is apparent from the fact that prior to this special election and by the amendment of the Charter of the City of Detroit, adopted April 7, 1919 (Title III, Chapter I, Sec. 13), the administrative powers and duties of the Common

Council of the City were defined so as to embrace the following:

(e) To submit to the electors of the City of Detroit at any election, general or special, propositions by law required or permitted to be submitted to said electors, bonds by law required or permitted to be submitted to said electors, questions or matters by law required or permitted to be submitted to said electors, and all propositions, questions or matters upon which said Common Council desires the vote of said electors.'

"The Common Council thus had the authority to submit the proposition to the electors, and the most elementary principle requires that the Common Council in exercising this authority should make the submission fairly and in a manner not calculated to mislead and deceive the voters.

"In thus providing for the submission, it was also plainly within the power of the Common Council to give to the electors convenient sample ballots with information as to the purport of the submission. To say that the Common Council may submit to the electors propositions and not do those ordinary and appropriate things which go with the submission in order to make it intelligible, would be, as it seems to us, a most extraordinary and unwarranted ruling. It is alleged in the bill of complaint that the City and Mayor and Common Council caused to be prepared and distributed to the voters some weeks prior to the election of April 5, 1920, what purported to be a sample ballot and setting forth the proposed plan (Transcript pp. 12, 13; see Ex. 6, sample ballot opposite p. 52). This was designated on its face

as ('Official Information'.) It was issued officially by the Common Council under its authority to make the submission."

The proposition was long, involved, technical and ambiguous. It needed an explanation, and the council, whose duty it was to submit it, had the right to explain it. In explaining it, by publishing and distributing these sample ballots with the official information thereon, the Common Council was exercising its power of submission. If the official statement that these lines were "to be *taken over*," had been printed on the ballot, no one would contend that there was a legal submission of the proposition to construct these lines. But the assurance given by the Common Council by publication and distribution of the sample ballots was even more effective than had it been printed upon the ballot. It was distributed at their homes long enough before election to give them an opportunity for examination and consideration, to the end that they might reach a deliberate judgment upon the important question which they were called upon to decide. This court would refuse to see a manifest truth if it failed to recognize the potency of such assurance. It should not fail to see that by study of these ballots and the information thereon, in their own homes the voters decided how they would vote and thereafter went to the polls and registered that decision. If it is held that these assurances are not to be regarded because not printed on the ballot, then a legal way is opened to the officials submitting the proposition to nullify the constitutional provision requiring the submission. In that case the constitutional provision requiring submission can be entirely disregarded by those whose power it was intended to limit. Surely officials charged with the duty of submitting a proposition can-

not so submit it as to obtain an affirmative vote therefor by official false pretenses.

As the duty of submission involves a duty not to deceive the voters as to the meaning of the proposition submitted, there was no such submission here as the law requires, and therefore no valid adoption of that proposition. Even if the adoption of a proposition be a quasi legislative act, which may be doubted, a valid submission is a necessary condition precedent to a valid adoption.

It may also be said concerning appellee's claim that it is to be presumed that the voters got their knowledge of the ordinance by reading the official publication thereof —a presumption impossible of application in this case— that in Michigan there is no such presumption. (See *Black vs. Common Council,* 119 Mich. 571), an authority which holds that there is no presumption from the publication of the ordinance that the voters saw it.

It may be said, too, that if the misrepresentations under consideration did involve a misrepresentation of law, they were in substance and effect nothing less than direct misrepresentations of fact, deliberately made for the purpose of effecting a deception and they accomplished that purpose, and even if they did involve a misrepresentation of law, courts will not for that reason refuse redress. Indeed, it is held that misrepresentations of law made by those standing in fiduciary relations invalidate the resulting transactions:

2 Pom. Eq. Jur., 4th Ed., 848.

Ludington vs. Patton, 111 Wis. 208.

Prince de Bearn vs. Winans, 111 Md. 434.

Tompkins vs. Hollister, 60 Mich. 470 (see p. 480).

Carpenter vs. Forging Co., 191 Mich. 45 (see p. 53).
Stevens vs. Collison, 249 Ill. 225.
Hall vs. Otterson, 52 N. J. Equity, 522.

The following authorities sustain our claim that the submission in question was invalid.

Judge Dillon, in discussing the submission of bonding propositions to popular vote, states that "Even when there is no direction as to the form in which the question shall be submitted to the voters, it is essential that it be submitted *in such manner as to enable the voters intelligently* to express their opinion upon it." (2 Dillon, Municipal Corporations, 4th Ed., Sec. 891.)

Boseman vs. Sweet, 246 Fed. (C. C. A. 9th Circuit) 370. Here the statute provided that a three per cent debt limit should not be exceeded except when authorized by popular vote. A waterworks bond issue was submitted, the question being stated only as of the issue of waterworks bonds in a specified sum, without calling attention to the fact that such an issue would exceed the debt limit. The court held that the submission was bad because the voters were entitled to be specifically informed that the effect of the issue was to increase the limit.

O'Beirne vs. Elgin, 187 Illinois 581.

Here a submission was had under a statute which provided for printing on a submission ballot, in addition to the question submitted, words calculated to aid the voter in answering the question. The ballot submitting the question of the issue of bonds to provide for a municipal electric lighting plant, in addition to a statement of the question, shall bonds for the purpose of providing funds for the propcsition mentioned in the ordinance printed herein, to the amount of $162,000 be issued, con-

tained this: "If you favor municipal ownership vote yes; if you oppose municipal ownership vote no." This was held bad because "it was not intended that public officers charged with a duty to impartially submit a question to a vote of the people should use the ballot as a vehicle for information or argument as to the motives that might influence the voter in making his choice."

If the distribution by public officers, in connection with the submission of the question to popular vote, of an argument in favor of municipal ownership, vitiates the submission as the above case holds, the distribution of the document containing the "official information" in the present case vitiates the submission of the street railway proposition, for, not only does it contain false representations, but the sample ballot, on the back of it, is headed with: "Instructions: If you favor the acquisition, ownership, maintenance and operation of a municipally owned street railway system in the City of Detroit, mark a cross (X) in the square after the word Yes; if you do not favor such a proposition, mark a cross (X) in the square after the word No."

(d) The proposition voted on, in itself, and without reference to the misrepresentations above discussed, was substantially defective and deceptive in that it authorizes the issue of $15,000,000.00 of bonds only, to acquire a complete system, when it was known to the city officials who framed and submitted the proposition, at the time of submission, that this amount was grossly inadequate for the purpose, and also in that the construction of the lines proposed as a part of the system in Highland Park and Hamtramck was impossible because in those municipalities the City of Detroit could not lawfully acquire any franchise rights.

The proposition on its face purports to authorize construction of a street railway system comprising the lines in Class C, as well as those in Classes A and B, and makes no distinction between them. It states that the $15,000,000 to be borrowed is for the purpose of acquiring and owning "said street railway system." As already appears, the city authorities were fully aware that the $15,000,000 would make no provision for the Class C lines which comprise some 55 miles of track (about a quarter of the complete system) for both the "official information" and the mayor's message explicitly show that no provision was made for these lines.

Defendant's counsel will contend, we presume, as they contended below, that the validity of the proposition and of its submission must be determined entirely from the language of the proposition itself, without rgeard to the misrepresentations of its meaning made by the "official information" or otherwise, but those representations at least show that the city officials knew the real situation, and that the complete system called for by the proposition would require millions of dollars more than the bond issue which was proposed for the purpose of acquiring it.

Beers vs. *Watertown* (South Dakota), 177 N. W. Reporter 502.

In this case the issue of certain bonds purporting to be authorized by popular vote was enjoined. Under the statute in force the Common Council had the power to appropriate money for the purchase or erection of any system, or part of a system, for the purpose of providing light, heat and power for municipal, industrial and domestic purposes, and to submit to the electors the question of the issue of bonds to provide funds for such

appropriation. They submitted the question in this form; whether the city should issue bonds in a specified amount for the purpose of constructing or purchasing a system for the purpose of providing light, heat and power for municipal, industrial and domestic purposes. The proposition carried. It was averred in the bill (the question arising upon demurrer) that the city council contemplates the immediate construction of a system for lighting the streets and furnishing power for pumping water; that the electors voted the bonds under the belief that the amount authorized was sufficient with which to provide a complete system, and that money would be used to provide a system furnishing electricity for all three purposes, municipal, industrial and domestic; that the amount authorized is wholly inadequate to provide a system for the three purposes, and that the council plan a system which will furnish light and power solely for municipal purposes. The court sustained the issue of an injunction, saying (p. 505):

> "It may be that facts existed which would fully justify the council in providing an electric system for municipal purposes only; and it would certainly have full authority under the statute to do so if it had funds properly available for that purpose. It may be that the electors of the city would gladly authorize the issuance of bonds for the purpose of getting such a limited system; but they have not so voted. The council would have no right to use the funds from the bonds for purposes other than those contemplated by the electors. To knowingly start in to use these funds when the council knew that they were insufficient to accomplish the contemplated purposes, and when the council intended to provide a system

radically different than what the electors were led to expect, would be as gross a perversion of the funds as to use them for a purpose entirely strange to that for which they were authorized."

The case of *Wheeler vs. Denver* (C. C. A. 8th Circuit) 231. Fed., p. 8, which may be cited as against our position, is distinguishable. In that case under an explicit provision of the City Charter the electors authorized the issue of eight million dollars of bonds to provide a municipal water plant or system and everything incidental or necessary thereto, for supplying the city and its inhabitants with water for all uses and purposes. (See paragraphs 5 and 7 of the Charter, pp. 14 and 15 of the case.) It appeared that the amount authorized was entirely insufficient to construct a complete plant, and it was contended that as the voters only contemplated a complete plant, and did not vote upon the question of an issue to construct a partial or incomplete plant, it would be a fraud on the tax payers to permit the issue and use the bonds, the theory being that the voters would not have authorized the issue if they had known the system could not be built for that amount. The form of the submission did not appear, but it was in an amount and for a purpose explicitly authorized by the city charter. There is nothing in the case to indicate that when this submission was had it was known by the officials or by any one that there was reasonable ground to believe that the proposed bond issue would be inadequate for the purpose.

2. The scheme of acquisition, of which the proposition voted on is a part, involves in fact an attempt to deprive plaintiff of its property without due process of law in violation of the 14th Amendment.

As already stated (this brief p. 6) tracks upon the streets now occupied by those portions of the Fort Street line and the Woodward Avenue line, the original franchises of which have expired, are essential to the proposed municipal system, and municipal tracks thereon can only be acquired either by taking over the existing tracks of the plaintiff, or by removing those tracks and replacing them with new ones. The establishment of the proposed city system necessitates either getting our property by purchase or destroying it by removal.

It appears by explicit averment of the bill that notwithstanding the expiration of these original franchises, the company has, through municipal action recognizing the necessity of continued operation, and granting the right to continue, and through its own expenditures upon these lines since the expiration of the original grants, made by authority of the municipal officials and with their acquiescence and that of the people of the city, acquired the right to continue these tracks until their discontinuance shall be consistent with public interest.

If under these facts the city has lost the right of immediate ouster, which arose at the expiration of the original franchises, and the company has acquired a right to continued operation, that is a valuable property right which the city cannot terminate at its arbitrary will.

It is maintained by the defendants that because under the Michigan constitution, Article VIII, Sec. 25, a municipality cannot grant a public utility franchise not subject to revocation at its will without the affirmative vote of three-fifths of its electors voting thereon, the company has not acquired any right to continue these

tracks, but that their removal may be required now as it might have been at the time of the expiration of the original franchises.

Does this constitutional provision preclude the acquisition, without a popular vote, of a right in the nature of a franchise right, revocable whenever its termination shall be consistent with the public interest?

The question is whether such a right can be created either by grant or by estoppel. It is our position that although under the Michigan constitution a popular vote is necessary to validate the grant of a *term* franchise, a right, in the nature of a franchise, to continue the use of tracks until their discontinuance shall be consistent with public interest, may be created either by consent or grant of the municipal officials, or, in the absence of such grant, may be created by the acquiescence of the people of the municipality in the improvement and continued operation of such tracks pursuant to the direction and consent of the municipal officials. As a municipality may be estopped through action or acquiescence of its officials in a matter over which they have power, so in a matter over which the people have power, it may be estopped by the people's acquiescence in, and tacit approval of, action taken under the direction of the municipal officials. In the present case the right to continue rests upon both grounds, grant and estoppel.

The constitutional prohibition against the grant, without popular vote, of any public utility franchise, not subject to revocation "at the will of the city or village," does not mean that rights acquired without a popular vote may be arbitrarily terminated. The public will, which determines the revocation, is not uncontrolled and absolute. It is to be exercised if and when the public interest requires, and not otherwise.

The Supreme Court of Michigan expressed this distinction in their decision in *Peck vs. Detroit United Railway,* 180 Mich. 343, where they sustained the validity of a franchise grant which by its terms was to be ended "by the Common Council or the people of the City of Detroit at their pleasure or caprice." The Court say that the most that can be claimed for the grant in question "is that it is a revocable right. It is immaterial whether it is termed a grant, license, franchise or permit. Its important feature in this discussion is that whatever it is termed, it is revocable at the will of the city *whenever the public interest requires its termination.*" (See opinion, p. 347.)

The decision of *Denver vs. Denver Union Water Company,* 246 U. S. 178, necessarily involves the principle for which we contend.

The city ordinance, whose validity was attacked in that case, recited that the Water Company was a mere tenant by sufferance, and declared that it was made to regulate its charges "during the time it shall further act as a water carrier and tenant by sufferance in said streets." The ordinance was presented to the city council by initiated petition of electors, and was passed by the council without reference to popular vote (See opinion, p. 188). The Colorado Constitution contained, Article XX, Section 4, relating to the city and county of Denver, (I Mills Statutes, Colorado, p. c-277), the provision that *"no franchise relating to any street, alley or public place of the said city and county shall be granted except upon the vote of the qualified tax-paying electors."*

(The brief for appellees on their motion to dismiss, states with reference to this case (see p. 21) that "There was no constitutional prohibition against such action.")

It was contended on behalf of the city that as the company was merely a tenant by sufferance, its property was subject to immediate removal at the arbitrary will of the city, and therefore must, for the purpose of fixing a reasonable return upon its value, be taken at junk value. The court, however, construed the ordinance (p. 190) as "the grant of a new franchise of indefinite duration, terminable either by the city or by the company at such time and under such circumstances as may be consistent with the duty that both owe to the inhabitants of Denver;" and held that the property of the company must therefore be valued as property in use.

In this Denver case it was the ordinance of the Council which was held to give a franchise right of indefinite duration, *notwithstanding the constitutional inhibition upon franchises granted otherwise than by popular vote.*

In *Detroit United Railway vs. Detroit,* 248 U. S. 429, this court held an ordinance which purported to regulate the rates of fare on the company's entire city system, including both franchise and non-franchise lines, and which by its terms was to remain in force a year unless amended or repealed, to amount "to a grant to the company for further operation of the system during the life of the ordinance," which necessitated a fair return to the company upon its investment. The decision is based by the court upon the decision in the Denver case, although the provision of our state constitution is not referred to.

If such a right can be created by ordinance, it may equally be created by estoppel. What the Common Council might do to create a continuing right to operate the Fort and Woodward lines by passing an ordinance,

they might likewise do by recognizing the necessity of continued operation, and directing and permitting the expenditures which made continued operation possible. And the acquiescence of the people shows their approval of the action of the city officials.

The continued operation of these lines after the expiration of their franchises was necessary in the public interest and was so recognized by every one.

Early in 1909, the year when the city claims the Woodward Avenue franchise expired, and the year before the expiration of the Fort Street franchises, the Common Council authorized payment of the expense of an investigation of the street railway situation undertaken with a view to continuance of service in the future. To a bill filed to enjoin this payment from city funds, the city and its officials made answer as appears by the report of the case, *Attorney General vs. Circuit Judge,* 157 Mich. 615 (see pp. 617-618) saying among other things that certain street railway franchises are to expire in November, 1909, "That these defendants are informed and believe that the character of the population, the manner in which the city has been built, is such that street railway service is essential in order to accommodate the people from day to day. That it is necessary to take steps to continue the street car service. That the City of Detroit as a municipality is powerless to engage in this enterprise itself, and that it is incumbent upon the officers of the City of Detroit to make an investigation and ascertain, if possible, upon what terms and upon what conditions the city may continue to enjoy street railway facilities."

This was before the city was given the power to acquire a municipal street railway system. The course of

action of the city authorities directing and authorizing expenditure by the company to enable the continuance of the service, the necessity for which the city thus solemnly recognized, began immediately in 1909 and was pursued in the years following. It was provided for by the Common Council by ordinance and by resolution. There was needed, in order that operation might continue and the lines give efficient service, large and continued expenditure of money. Those expenditures were made in part under the explicit direction, and in all cases with the permission of the municipal officers. The public knew of these things, tacitly approved them, and have enjoyed their benefits for some seven years after the time when by the Fort Street decree, the city's power of ouster was made legally effective.

Defendants assert that notwithstanding these arrangements for continued operation, the company's expenditures upon the strength of them, and public acquiescence and approval, the Fort Street decree is still enforcible, and that the city may compel immediate removal of the line on that part of Woodward Avenue where the franchise expired in 1909.

It is held, however, in an early Michigan case, whose authority has never been questioned (*Ramsdell vs. Maxwell,* 32 Mich. 285) that where, after a decree for possession under a foreclosure sale upon which a writ of assistance might have issued, a new arrangement is made between the parties under which the mortgagor continues in possession, a writ of assistance cannot thereafter be issued, and the question of the right to continued possession cannot be determined on the application for such a writ, but must be litigated independently.

This is a direct authority that the Fort Street decree is no longer enforcible.

See also

Barlow vs. Beattie, 28 N. J. Equity 412.

Judge Dillon, in discussing this subject says that a municipal corporation

> "does not own and cannot alien public streets or places, and no mere laches on its part or on that of its officers can defeat the right of the public thereto; yet there may grow up in consequence, private rights of more persuasive force in the particular case than those of the public. It will perhaps be found, that cases sometimes arise of such a character that justice requires that an equitable estoppel shall be asserted against the public but if so, such cases will form a law unto themselves, and do not fall within the legal operation of limitation enactments. The author cannot assent to the doctrine that, as respects public rights, municipal corporations are impliedly within ordinary limitation statutes. It is unsafe to recognize such a principle. But there is no danger in recognizing the principle of an *estoppel in pais* as applicable to exceptional cases, since this leaves the courts to decide the question, not by the mere lapse of time but upon all the circumstances of the case to hold the public estopped or not as right and justice may require" (3 Dillon, Municipal Corporations, 5th Ed. Sec. 1194).

City Railway Company vs. Citizens Street Railway Company, 166 U. S. 557.

This case was an appeal by the Citizens Street Railway Company to enjoin the defendant from disturbing it

in the construction, operation and maintenance of its street car system. The right to injunction depended upon the validity of an ordinance extending the plaintiff's original franchise for seven years. It was attacked mainly on the ground of want of consideration for the extension. After the passage of the extending ordinance, the company had floated a refunding loan upon the strength of the extension. The court say (p. 566):

> "While this transaction cannot properly be termed a legal consideration for the ordinance since the negotiation of the new loan was neither a benefit to the city nor a detriment to the Railway Company, yet we think that the subsequent negotiation of the loan operates against the city by way of estoppel. All that is necessary to create an estoppel in pais is to show that upon the faith of a certain action on the part of the city, which it had power to take, the company incurred a new liability; as for example, by the negotiation of a new loan and the issue of a new bond and mortgage to secure the same. Under such circumstances, justice to the bondholders who have in good faith invested their money in reliance upon the validity of such action demands that the city shall be held to its contract notwithstanding there may have been originally no consideration to support it."

Essex vs. New England Telegraph Company, 239 U. S. 313.

In this case the town of Essex was enjoined from interfering with the operation of lines owned by the appellee company, which was plaintiff below. It appeared that while the company had in 1884 made application pur-

suant to the Massachusetts statute to the Essex Selectmen for a right-of-way for their lines, that application was never granted, but shortly thereafter the lines in question were constructed and for some twenty years were maintained at large expense along the town highways, and that during many years no objection was made to their operation. After stating that had the records of the Selectmen shown that in response to the company's application they had given a writing specifying the location of the lines and character of the construction and they had been constructed accordingly, such lines would be protected against exclusion or other arbitrary action by the town, the opinion continues (p. 321):

> "With full knowledge of all circumstances, the town authorities permitted the location and construction of lines along the highways, and for more than twenty years acquiesced in their maintenance and operation. The company has expended large sums of money and perfected a great instrumentality of interstate and foreign commerce, in the continued operation of which both the general public and the Government have an important interest. Under similar circumstances it has been determined, upon broad principles of equity, that an owner of land, occupied by a railroad without his previous consent, will be regarded as having acquiesced therein and be estopped from maintaining either trespass or ejectment (citing cases) and like reasons may demand similar protection to the possession of a telegraph company. A municipal corporation, under exceptional circumstances, may be held to have waived its rights or to have estopped itself. (Citing cases,

including the City Railway case above referred to and the section we have quoted in Dillon, Municipal Corporations.)"

In each of the two cases last cited, the municipality had power by a prescribed method to grant a franchise right, but that method was not pursued nor was any other method of grant adopted. It was held nevertheless to have been estopped by its acquiescence in the exercise of the right which might have been granted.

In providing for a public utility service by granting a franchise under which that service is to be rendered, the municipality is acting in its private and not its governmental capacity. In determining whether it is estopped to question the exercise of such a right which might have been granted, the courts proceed upon the same grounds and apply the same rules as in the case of a private individual.

Eau Claire Improvement Company vs. *Eau Claire*, 179 N. W. (Wis.) 2.

In the case at bar there was municipal power to grant the right which we claim. Admitting for the purpose of the argument that a popular vote would be necessary to the validity of such a grant, the people may estop themselves by their acquiescence in the exercise of the right in like manner as the municipal officials would estop themselves by a similar acquiescence had the right to make the grant lain in them.

As the company has, under the circumstances (as we have shown) a property right in the portions of the Fort and Woodward lines where the original franchises have expired, not terminable at the arbitrary will of the city, the scheme of acquisition of the proposed municipal system violates that right.

It is manifest that the property of the company in these lines will be taken without due process of law either if the adoption of the proposition for street railway acquisition by the electors (which is the only basis on which it is claimed that the city has authority to acquire a system) does not give valid authority to acquire, or if the plan of acquirement involves the taking of the company's property either by illegal means or without making fair compensation for it.

That the adoption of the proposition did not give the city valid authority to acquire a system we have already shown. (See this brief, pp. 38-55). That the plan of acquirement involves taking the company's property without making fair compensation and that the proposed means of acquisition (independently of the lack of valid authority to acquire a system) are in themselves illegal, is manifest.

To carry out its plan, the city must either obtain this Fort and Woodward trackage by purchase, or remove it and put in new tracks of its own. The scheme, as already shown, is to compel a sale at an inadequate price by threat of removal or actually and by illegal means to prosecute removal so far as may be necessary to force such a sale. Whether the property is taken by purchase or destroyed by removal fair compensation is not contemplated, and this plan is to be carried out at once without affording any opportunity to test its validity by legal proceedings. (See this brief, pp. 14-15).

Under the Denver case, 246 U. S. 178, the company has indeterminate franchises in these portions of the Fort and Woodward line, terminable only when the termination is consistent with public interest and therefore not before the city has obtained legal authority to provide

the service that the public needs, otherwise than through the company's operation of these lines. Nor can those franchises be terminated and the company's property in the lines which they cover be either taken over by the city or destroyed by removal, without making fair and adequate compensation for the property so taken. For the service which the public has needed, and which it has had since the original franchises upon these lines expired, could not have been furnished without large expenditure in reconstruction and maintenance of the lines. That expenditure the company made with the direction and approval of the people and their representatives. But for these circumstances it might be plausibly claimed that whenever the city was legally authorized to provide service itself, it was in a position to require a removal of the tracks, though even in that case it could not for reasons already pointed out, lawfully use that power as a means of compelling appellant to sell its tracks for an inadequate price.

This it may be said the city would have had a right to do when the original franchises expired, but it is plain that the city cannot, when it needs continuing service, confer upon the company the right to continue that service for an indefinite time and induce it to invest the money necessary to provide that service, without incurring an obligation to compensate fairly for the property thus created when it is in a legal position to provide its own service instead and elects to do so.

As for the illegality of the threatened removal of this trackage by which the city expects to compel its sale, it is sufficient to refer to the language of Judge Lurton in delivering the opinion of the Court in *Louisville Trust*

Company vs. City of Cincinnati, 76 Fed. (C. C. A. 6th Circuit) 296, see p. 317; "A litigant may not execute his own decree. If the adversary will not quietly surrender the subject of litigation, resort must be had to the court in which the right was declared for the proper legal writ, and for its regular execution." Much the less could the city without obtaining any adjudication upon the rights now claimed in the Fort and Woodward lines undertake by its own action to put the company off those streets.

That the execution of such a scheme would deprive plaintiff of its property without due process of law does not require argument. The cases are numerous and uniform.

Cuyahoga Power Co. vs. Akron, 240 U. S. 462;
Cincinnati vs. Traction Co., 245 U. S. 446;

are directly in point.

The case of *Denver vs. New York Trust Company,* 229 U. S. 123, cited by the defendants in the court below as supporting their claim that if the city's plan involved taking over the plaintiff's property as alleged, it would not therefore be objectionable on constitutional grounds, is contrary to their contention, as the following quotation from the opinion of the court shows (p. 141):

> "The next objection invokes the due process of law clause of the Fourteenth Amendment to the Constitution of the United States, and is, that the charter amendment subjects the water company to the alternative of accepting an inadequate price for its plant or of having its value ruinously impaired by the construction and operation of a municipal plant, and that this amounts to an unlawful deprivation of property. The objection

> is faulty in that it fails to recognize the real situatic to which the charter amendment applies. The water company, although the undoubted owner of the physical property constituting its plant, *is without a franchise to maintain and operate it through the streets of the city, the prior franchise having expired;* and the city not only is under no legal obligation to renew the franchise or to purchase the plant, but is free to construct and operate a plant of its own. How then can it be said that the proposal, expressed in the amendment, to purchase the company's plant at $7,000,000 and to devote $1,000,000 more to its betterment, or else to construct a new one at a cost of $8,000,000, involves an unlawful deprivation of property or any right? * * * Whether $7,000,000 is an adequate price for the company's plant, and whether its value will be ruinously impaired by the construction of a municipal plant, are beside the question."

The words which we have italicized in the above quotation show the distinction, and show that had the company in that case had the right to continue in operation, the decision would have been otherwise.

The same distinction is emphasized in the case of *Newburyport Water Co. vs. Newburyport,* 193 U. S. 561, to which the opinion last cited refers. The water company in this case was operating under a charter repealable at legislative pleasure. The legislature authorized the municipality to purchase the company's plant, should the company elect to sell it, at a valuation to be ascertained as provided in the act; but, should the company refuse to sell, authorized the construction of a municipal plant. The company offered to sell, but being dissatisfied with

the valuation made, filed its bill to set aside the transaction, claiming that its sale was compulsory because the city was authorized, should it not sell, to erect its own plant, which would be ruinous to the company, and therefore that its property was taken without due process of law.

The court held, Mr. Justice White, now Chief Justice, writing the opinion—that inasmuch as the company's charter was not exclusive, and was repealable at will, no right of the company would have been infringed had the legislature authorized the construction of the municipal plant (which would destroy the value of the company's plant) without conditioning it upon the company's being given an opportunity to sell. This was held to take the case (see p. 578) "out of the reach of the authorities which are relied upon as establishing that one cannot enforce a contract benefit derived from or advantage gained over another by coercing his will by means of threats, even of the doing of a lawful act." It was held that the company's sale was therefore voluntary and not compulsory.

The argument thus far on this branch of the case has proceeded on the supposition that the city's scheme contemplates depriving the company of its property by illegal means.

If, however, it were the plan of the city either to compel the sale or enforce the removal of property which the company has a right—not terminable at the arbitrary will of the city—to continue in operation, accomplishing such purchase or removal through threat of legal proceedings or as a result of such proceedings, and not by illegal means, its proposed action would be an abuse of process and not due process of law, for its purpose would

be in effect the accomplishment of an unlawful end by action not in itself illegal. It would be in short within the scope of the authorities referred to by Mr. Chief Justice White in the Newburyport case as holding "that one cannot enforce a contract benefit derived from or advantage gained over another by coercing his will by means of threats even of the doing of a lawful act."

The cases are not indeed uniform, but there are numerous and weighty authorities to the effect that where action not illegal is threatened or taken for the purpose of compelling the making of a contract or obtaining some other advantage, the resulting transaction will be avoided.

Fillman vs. Ryon, 168 Pennsylvania, 484.

Here an arrest was made under a regular warrant and for probable cause, but for the purpose of extortion. The person arrested was allowed to recover the money that he was induced to pay by reason of his imprisonment.

From numerous cases to the same effect we select the following:

Marlatte vs. Weickgenant, 147 Mich. 266.
Morse vs. Woodworth, 155 Mass. 233.
Adams vs. Irving National Bank, 116 N. Y. 606.
City Bank vs. Kusworm, 88 Wis. 188.

See also *Silsbee vs. Webber,* 171 Mass. 378. In this case plaintiff's son had confessed to his employer that he had stolen money from him. To prevent the employer from telling her husband who was ill and whose reason plaintiff feared would be affected if the disclosure was made to him, plaintiff transferred certain property to the employer. It was held that she was entitled to recover

as for payment under duress, although what was threatened would not have been an actionable wrong. The court say, Mr. Justice Holmes writing the opinion, "If a contract is extorted by brutal and wicked means * * * the contract may be avoided by the party to whom the undue influence has been applied."

In the case at bar, as the bill avers (R. p. 14) the defendants do not design either the abandonment of use of the streets in question for street railway purposes or the construction of new lines thereon, but the proposed order of removal is designed, not for the purpose of obtaining their removal, but to force their sale to the city at less than their value. Whether lawful or not (our claim is that it is unlawful because use of illegal means is threatened) this proposed action of the city is for an unlawful purpose, namely, to compel the plaintiff to part with its property for less than its value. If such a transaction were consummated it would be set aside, and its consummation will be restrained in equity as an attempt to obtain property without due process of law.

Even if it were true—and we deny it is true—that the city authorities may at any time put an end to appellants' right of operating its non-franchise lines by a lawful exercise of the power to compel appellant to cease operation and to remove its tracks, it is none the less true, as pointed out on pp. 31-36 of this brief, that to use that power as the city intends and threatens to use it in this case, is unlawful and would result in depriving appellant of its constitutional rights. This is an argument just as applicable to our claim for relief as it is to our claim that the court has jurisdiction, and we think that it alone is sufficient to entitle appellant to relief, because the scheme of the city authorities

which they are attempting to carry out, necessarily involves the acquisition by purchase of the non-franchise lines, and without them the other lines to be constructed where there are now no tracks, will be useless.

We desire that the brief of former Justice Hughes herein referred to, filed by him as counsel for appellant in opposition to appellees motion to dismiss or affirm, be considered at the hearing on the merits with the same effect as if it were incorporated herein.

We submit, therefor, that the Federal court has jurisdiction: that the Bill states, both upon constitutional and upon local grounds, a case for equitable relief and that the decree should be reversed and the case remanded with appropriate instructions.

Respectfully submitted,

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